

# FAQ: Insurance Coverage and COVID-19

Please note: Each insurance policy is unique and should be reviewed by your organization's insurance professional, legal counsel, etc. Bolton & Company is not an arbiter of coverage—it is your carrier that determines coverage.

If you have any other questions please don't hesitate to reach out to your Bolton contact who will be happy to assist you.

## Business Interruption:

### Do I have coverage if I have to close my business because of COVID-19?

It depends on your insurance policy. If you close your business voluntarily, that's considered a business decision and will likely not be covered. Even if a government agency requires your business to close, there is likely no coverage because business interruption usually requires "direct physical damage or loss" to trigger coverage. Additionally, as a result of prior epidemic events such as SARS, MERS, and H1N1, many insurers began to add exclusions covering viruses and infectious diseases.

### What if my business has to close due to civil authority?

Once again, most civil authority policy provisions require the cause of civil authority to be a "covered cause of loss," which usually requires "direct damage or loss" and/or has a virus exclusion. There are, however, a small number of policies that only require that access to your business is prevented by an order from a governmental authority within a certain proximity to your business.

### What if my business has to close because my facility is contaminated with COVID-19? Is there coverage for decontamination?

Most policies have a virus exclusion, which could apply to a pollution policy, thereby excluding coverage. There are a few policies which offer a sublimit (usually \$10,000-\$25,000) for business interruption and clean-up.

### What if I have to close or reduce my operations because my suppliers or customers are affected by COVID-19?

In rare cases, coverage can be found under contingent basis interruption, however, this usually requires the underlying cause of damage to the customer or supplier be of the type covered with respect to the business' own policy. So if contagious disease is excluded under the underlying policy, it would also exclude contingent business interruption disruption caused by the coronavirus. On the other hand, supply chain coverage may provide narrow coverage for disruptions or delays for specific products or services which are not limited to physical loss or damage.

### What if it is only a partial shutdown of business?

A partial shutdown is likely voluntary and would most likely not be covered. If business has slowed significantly, it is possible that this could trigger supply chain or contingent business interruption coverage, but the same limitations as mentioned above would apply.

### Is the government doing anything to help business owners find coverage?

Similar to California's intervention during the 2018 mudslides, various states are enacting legislation to clarify insurance coverage for residents. In New Jersey, the legislature is currently considering a law to require insurers to cover business interruption losses, even where there is a virus exclusion.

The New York Department of Insurance has just issued a letter to insurers requiring them to provide policyholders with an explanation of coverage for policies providing business interruption, civil authority, contingent business interruption, and supply chain coverage. The explanation must include how the policy would respond under the current conditions and as the situation develops. This would include potential coverage, not just coverage being currently triggered.

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## Liability:

### **What if third parties allege we negligently caused them to contract the coronavirus?**

There is likely coverage. Unlike most property policies, general liability policies typically do not contain exclusions due to viruses. Coverage would include any settlement or judgment and the cost to defend the claim. Importantly, the third party has the difficult burden to prove that they contracted the coronavirus due to the negligence of the policyholder.

### **What about D&O coverage?**

Coverage may apply where shareholders allege financial harm was caused as a result of the insured's wrongdoing. The real challenge will be disclosure and shareholder derivative actions, including failure to develop a business continuity plan.

### **What happens if we have to lay off staff?**

There is potentially coverage if employees allege wrongful termination based on discrimination under an Employment Practices policy. An additional concern for employers with over 100 employees is that layoffs may trigger notice obligations under the federal Worker Adjustment and Retraining Notification (WARN) Act or state "mini-WARN" Acts.

The WARN Acts require employers to provide 60 days' advance notice of a layoff of 50 or more employees. Consult with your legal counsel to see if the WARN Acts apply to your business

## Trip Cancellation:

### **Can I get a refund for my non-recoverable, non-refundable deposits and advanced payments for the cost of Travel Arrangements?**

It depends on the policy, but many trip cancellation policies include coverage where a government agency issues warnings or advises against all but essential travel to your destination. Policies usually require the warning to be issued after the policy is purchased.

### **What about event cancellation?**

It depends on the policy. An "all-cause" event cancellation policy or optional infectious or communicable disease coverage could potentially cover cancellations due to infectious or communicable diseases. Coverage will most likely only cover outbreaks which begin after the policy is purchased, and in this case that's January 2020. Trip cancellation policies may also contain a "pandemic" exclusion.

### **Does a Force Majeure clause apply?**

Possibly. Some clauses excuse nonperformance for any circumstance beyond the other party's control, and others list specific events that trigger the clause. Even where a pandemic is considered a triggering event, the other party may have to show that performance was impossible and not just impractical. They may have to show that they have taken reasonable steps to perform under the contract, regardless of the triggering event.

Consult with your legal counsel for your specific contractual duties

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## Workers' Compensation:

### **Are insurance carriers still open to handle current Workers' Compensation (WC) claims unrelated to Covid-19?**

Yes, we have not heard of any closures, and most carriers are having their staff work remotely. Expect some delays as carriers adjust to staff shortages, etc.

### **What about litigated claims, how are these being handled?**

For any claims with upcoming hearing dates, only expedited or priority hearings are currently being held. For all other hearings, the courts are offering to have those telephonically, or they are being postponed and rescheduled. Expect delays until the situation settles.

### **Will existing claims be placed on a lower priority to handle new Covid-19 claims?**

No, claims will continue to be handled normally, however do expect things to move slower than normal.

### **Are medical facilities still open?**

Each medical facility will be different depending on their business concerns. The largest occupational clinic in the U.S., Concentra, does remain open and is taking existing and new patients. We recommend checking with your local clinic to confirm their availability. Employees should expect to be pre-screened prior to coming into or entering the clinics and may be directed elsewhere if they are exhibiting symptoms related to coronavirus.

Most clinics will not be able to test for Covid-19 as there is a general shortage of testing kits, and these employees would be directed elsewhere if that is their need.

### **I have employees who were working modified duty, but now we have no work available. Will they be paid through WC?**

Each situation is going to be a little different. We recommend reaching out to the adjuster on this specific claim so they can make that determination. If all employees are off work due to the coronavirus, and absent this you would have still been able to accommodate modified duty, make sure to let the adjuster know this. For employees where WC will not pick up benefits, they may be able to apply for unemployment during this period and we recommend advising them of this..

### **I've been using a transitional work program to send my employees to a non-profit because we don't have mod duty available at our facility. Are these services still available?**

Yes, these services are still available however there may be shortages on placements as individual non-profits might not have capacity or be closed in certain areas. If possible these employees will be redirected to other facilities.

### **I had to lay off employees, what happens if they file a WC claim post-termination? How can I prevent these post-termination claims?**

If an employee is filing a WC claim please report the claim, and let the carrier know the circumstances so they can investigate the merits of the claim. If you are laying off employees, we recommend letting them know about their options to file for EDD, and keeping the lines of communication open. If it is a temporary layoff, and you plan on rehiring them once work picks back up, let them know. For information on potential EDD benefits during this pandemic:

[https://www.edd.ca.gov/about\\_edd/coronavirus-2019.htm](https://www.edd.ca.gov/about_edd/coronavirus-2019.htm)

These are scary times for everyone, keeping the lines of communication open will be vital. If you have an Employment Practices Liability policy in place, check if the policy allows access to a labor attorney hotline that can help answer any questions or provide guidance on the layoff(s).

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